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Date of Decision: 12th December 1995

CRIMINAL APPEAL NO. 909 OF 1987

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA

and

HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may  
be allowed to see the judgment? Yes

2. To be referred to the Reporter or not?  
No

3. Whether their Lordships wish to see  
the fair copy of judgment? No

4. Whether this case involves a  
substantial question of law as to the  
interpretation of the Constitution of  
India, 1950 or any order made  
thereunder? No

5. Whether it is to be circulated to the  
Civil Judge? No

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Shri Sunil C. Patel, Advocate, for the Appellant

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent  
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CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.

(Date: 12th December 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed  
by the learned Sessions Judge of Surendranagar on 8th December  
1987 in Sessions Case No. 21 of 1987 convicting the appellant of  
the offence punishable under sec. 302 of the Indian Penal Code,  
1860 (the IPC for brief) and sentencing him to rigorous

imprisonment for life is under challenge in this appeal at the instance of the original accused.

The facts giving rise to this appeal move in a narrow compass. The incident is stated to have occurred on 7th January 1987. The place of incident, according to the prosecution version, was nearly one sweetmeat shop in the name and style of Jai Mahavir Mart opposite Milan Talkies in Surendranagar. The shop belonged to the complainant and his deceased brother, named, Rasikbhai (the deceased for convenience). On the previous day, the appellant had gone to the shop of the deceased and had consumed some sweets and he wanted payment to be made later on. He was denied the credit facility by the complainant on the ground that the previous outstanding in the sum of Rs. 5 was not cleared. The appellant was required to make payment for the sweets consumed by him. He was thereupon displeased with the complainant and presumably his deceased brother also. It is the prosecution version that he left the sweetmeat shop with a threat of dire consequences some time later. On the day of the incident, the complainant is reported to have set out from his home around 8.45 a.m. It may be mentioned that the complainant and the deceased resided in Bungalow No. 55 of one housing society by the name of Swastik Society. When the complainant was near Bungalow No. 15 in that very society, the appellant met him and abused him for not giving any credit for the sweets consumed by him in the previous evening. According to the prosecution version, the complainant was about to be assaulted at that time but he somehow hurriedly ran away to his shop. He reported the incident to his deceased brother. Both the brothers thereupon went to the police station and lodged the complaint of the incident. The police assured them all necessary action. Thereupon both the brothers returned to their shop around 9.30 a.m. on that very day. It is the case of the prosecution that the appellant reached the rickshaw stand opposite the sweetmeat shop of the complainant and his deceased brother at about 10 a.m. on the day of the incident. At about 10.45 a.m. the complainant was leaving the shop to ease out. According to the prosecution, the complainant was then beckoned by the appellant to approach the latter. Abuses were hurled by the appellant to the complainant. The complainant felt that he might be assaulted. The deceased was in his shop. He also apprehended assault on his brother. He took his 'tavetha' and came out of the shop with a view to protecting the complainant. According to the prosecution version, at that stage the appellant came out of the rickshaw after taking out his knife from its sheath and inflicted one blow on the left side of his abdomen rupturing the liver and the spleen. The deceased thereupon collapsed. He was carried to M.G.S. Government Hospital at Surendranagar. In the meantime, the complainant gave his complaint of the incident. That set the investigating machinery into motion. The investigating officer went to the

hospital and recorded the dying declaration of the injured victim. He also sent for the Executive Magistrate with a yadi. The Executive Magistrate also recorded the dying declaration of the injured victim between 12.50 p.m. and 1.05 p.m. The medical officer in charge of the hospital advised the patient to be carried to Ahmedabad as his condition was found to be somewhat serious. Thereupon the injured victim was brought to V.S. Hospital in Ahmedabad. On examination he was declared dead. It appears that he breathed his last during his journey from Surendranagar to Ahmedabad. The dead body of the deceased was brought back to M.G.S. Hospital at Surendranagar. Its post-mortem examination was carried out by the medical officer in-charge. The appellant came to be arrested on 9th January 1987. On completion of investigation, the charge-sheet against the appellant as the accused was submitted to the court of the Chief Judicial Magistrate at Surendranagar charging the accused with the offence punishable under sec. 302 of the IPC. Since the trial of the case was beyond the competence of the learned Magistrate, it was committed to the Court of Sessions at Surendranagar for trial and disposal. It came to be registered as Sessions Case No. 21 of 1987. The charge against the appellant-accused was framed on 15th October 1987. He did not plead guilty to the charge. He was thereupon tried. After recording the prosecution evidence and after recording the further statement of the accused under sec. 313 of the Code of Criminal Procedure, 1973 and after hearing rival submissions, the learned Sessions Judge of Surendranagar convicted the accused of the offence punishable under sec.302 of the IPC and sentenced him to rigorous imprisonment for life. The aggrieved accused has thereupon invoked the appellate jurisdiction of this court by means of this appeal for questioning the correctness of his conviction and sentence.

3. Learned Advocate Shri Patel for the appellant-accused has taken us through the entire evidence on record in support of his submission that the learned trial Judge was in error in coming to the conclusion that the prosecution had brought the guilt home to the accused beyond reasonable doubt. According to learned Advocate Shri Patel for the appellant, the place of the incident is shrouded in mystery and the ocular account given by two eye witnesses could not be relied on as they were interested witnesses. In the alternative, runs the submission of learned Advocate Shri Patel for the appellant, the evidence on record would go to show that the appellant acted in exercise of his right of private defence and at the most he could be said to have exceeded his such right by using a wrong weapon at the relevant time. It has also been urged on behalf of the appellant that it was a case of only one single blow and the appellant could not be said to have intended the murder of the deceased. As against this, learned Additional Public Prosecutor Shri Divetia has submitted that the learned trial Judge has

carefully appreciated the evidence on record and has reached the conclusion of guilt of the present appellant and that conclusion calls for no interference by this court in this appeal. It has been urged by learned Additional Public Prosecutor Shri Divetia that the ocular account given by the two eye witnesses, though related to the deceased, is quite truthful and trustworthy and that can be the basis of conviction of the appellant of the offence with which he stood charged at trial. The sum and substance of the submissions urged before us by learned Additional Public Prosecutor is that there is no warrant for interference with the judgment and order of conviction and sentence passed by the learned trial Judge on careful appreciation of the evidence on record.

4. It cannot be gainsaid that the deceased died of a homicidal death. It has clearly been established on record that the present appellant was responsible for the homicidal death of the deceased. The ocular account in that regard appears to be quite truthful and trustworthy. The witness at Exh. 23 is the complainant and he has seen the ghastly incident of the homicidal death of his brother with his own eyes. Some minor contradictions appearing in his evidence qua his complaint cannot and need not be overemphasised. It has to be remembered that the incident occurred on 7th January 1987 and his deposition was recorded some time on 11th November 1987 about 10 months later. One cannot expect a photographic memory on the part of a person so as to describe vividly all graphic details as to what exactly happened at what exact time. His evidence is corroborated by the oral testimony of the other eye witness, named, Vadilal Rajpal, at Ex. 25. The latter witness was the maternal uncle of the deceased. He had no grudge or grouse against the appellant. It would be too much to expect a person to swallow the bitter pill when someone else is ailing however dear or near that someone else could or would be. In that view of the matter, it is difficult to believe that the witness at Ex. 25 has not given a truthful and trustworthy account simply on the ground that he was the maternal uncle of the deceased. We are satisfied that the ocular account given by the two eye witnesses at Exhs. 23 and 25 are quite truthful and trustworthy and they can be relied on for the purpose of fastening the penal liability to the appellant-accused for the homicidal death of the deceased.

5. Learned Additional Public Prosecutor Shri Divetia for the State is right in his submission that no plea of private defence was taken at trial. It is true that no suggestion was made to the eye witnesses at Exs. 23 and 25 or either of them to the effect that the appellant was required to act in the manner he did with a view to defending himself against the likely assault or attack from the deceased. He does not seem to have taken such defence even in his further statement under sec.

313 of the Code of Criminal Procedure, 1973. It cannot however be gainsaid that, on the basis of the material on record, it would be open to the appellant-accused even at the stage of appeal to press into service his right of private defence in accordance with the well-settled principles of criminal jurisprudence. We have therefore permitted learned Advocate Shri Patel for the appellant to raise the new plea based on the right of private defence on the part of the appellant.

6. It transpires from the depositions of the eye witnesses at Exs. 23 and 25 that the deceased was engaged in his work and apprehending that his brother (the complainant) was likely to be assaulted by the appellant, he came out of the shop with his tavetha in his hand. This becomes clear also from his dying declaration at Ex. 90 on the record of the case. Therein he has eloquently and unequivocally stated that, with a view to protecting his brother, he came out of his sweetmeat shop with his tavetha in his hand. Prosecution Witness No. 5 at Ex. 25 has clearly stated that at the relevant time the deceased was busy doing his work. If the deceased had his tavetha in his hand at the relevant time, he must be busy in preparation of some sweets. It is everyone's common knowledge that the tavetha of a sweetmeat maker is sufficiently long and it would be quite hot if it was actually used for preparation of any sweet. Even at the cost of repetition, we may reiterate that, as transpiring from the deposition of the witness at Ex. 25, the deceased was engaged in his work and he had therefore his tavetha in his hand. It can therefore reasonably be inferred that the deceased came out with his tavetha which was quite hot at the relevant time as he was engaged in his sweets-preparatiion activities. Since the witness at Ex. 25 was on the counter, there could be no other inference except that the deceased was engaged in preparation of some sweet with tavetha in his hand. A heated tavetha could be a dangerous, if not deadly, weapon in the hands of its holder. When the appellant saw the deceased rushing towards him with his hot tavetha in his hands, it can reasonably be inferred that he might have been scared that he would be attacked with his hot tavetha. It is possible that, with a view to averting infliction of any such injury with the help of the tavetha, the appellant might have acted by taking out his knife. It appears that some scuffle might have ensued between the appellant and the deceased at the relevant time. It may be made clear at this stage that the ocular account regarding such scuffle is absolutely silent. The medical evidence on record however clearly shows that the appellant was found having sustained injuries in his left palm below his ring finger. The prosecution has not tried to explain the injuries found on the person of the accused at the relevant time. Learned Additional Public Prosecutor Shri Divetia is right in his submission that the medical certificate pertaining to the appellant at Ex. 12 shows that such injuries could have been caused by his own

knife. The medical certificate at Ex. 12 will have to be read in the light of the police yadi at Ex. 14 on the record of the case with which the appellant-accused was sent to the medical officer. In the very first point it was sought from the medical officer whether or not the injuries found on the person of the accused could have been self-inflicted. It is obvious that the medical officer tried to oblige the prosecution agency by incorporating in the certificate at Ex. 12 that the injuries was caused to the appellant by his own knife. It maybe noted that in his oral testimony at Ex. 7 the medical officer has remained silent with respect to the injuries found on the person of the appellant as to how such injuries could have been caused. Not a word has been stated by the medical officer at Ex. 7 in that regard. Ordinarily, we might not have highlighted this omission. The deposition at Ex. 7 given by the medical officer makes some interesting reading. He testifies the blood group of the appellant to be AB+. Nowhere in his evidence he has stated that he had himself analysed the blood of the appellant in the laboratory of his hospital or elsewhere. In that view of the matter, it becomes doubtful as to how the medical officer at Ex. 7 could find out the blood group of the appellant-accused. The only inference is inevitable. It appears that the serological report received from the forensic science laboratory was shown to the medical officer at Ex. 7 before he stepped into the witness box for giving deposition. The blood found on the clothes put on by the appellant at the relevant time was shown to be AB+. In view of this important circumstance appearing on the record, we are inclined to believe that the medical officer at Ex. 7, while issuing the medical certificate at Ex. 12 pertaining to the appellant, tried to oblige the prosecution by stating therein that the injuries found on the palm of the appellant at the relevant time could have been by his own knife keeping in mind the first point raised in the police yadi at Ex. 14. In that view of the matter, more particularly when injuries on the left palm of the appellant are found at the relevant time, we are of the opinion that some scuffle might have ensued between the deceased and the appellant at the relevant time. As pointed out hereinabove, the deceased was armed with a hot tavetha in his hand and in order to stave off some serious, if not dangerous or deadly, assault by the deceased, the appellant might have, in sudden and grave provocation, used his knife for inflicting the blow on the abdomen of the deceased. In this view of the matter, at the most it can be said that the appellant exceeded his right of private defence. The appellant could have staved off the likely assault by any other means without using his knife for the purpose.

7. In view of our aforesaid discussion, we are of the opinion that the appellant can be said to be guilty of the homicidal death of the deceased not amounting to murder. He would be guilty of the offence punishable under sec. 304 Part 2

of the IPC.

8. The same conclusion can be reached by examining the case from a different angle. The appellant had given only one blow to the deceased. If we accept the ocular account given by the complainant at Ex. 23 and the witness at Ex. 25, the deceased and the complainant were returning to their shop and at that stage the appellant inflicted a blow on the left side abdomen of the deceased. Such blow could not have been intended to cause the murder of the deceased. In that view of the matter also, the appellant can be said to be guilty of the offence punishable under sec. 304 Part 2 of the IPC.

9. The learned trial Judge has found the appellant guilty of the offence punishable under sec. 302 of the IPC. The minimum sentence prescribed therefor is imprisonment for life. That sentence cannot be sustained. The sentence awardable to the appellant for the offence punishable under sec. 304 Part 2 of the IPC is imprisonment for a term extending up to 10 years. It transpires from the record that the appellant was arrested on 9th January 1987 and he has remained in jail except for a few days between 13th February 1987 and 18th February 1987 during which period he was released on bail. He has thus remained in jail for nearly 8 years and 10 months. Even if the maximum sentence permissible for the offence punishable under sec. 304 Part 2 of the IPC is imposed on the appellant, with possible remission and other available benefits, the effective term of jail could be about 9 years or so. As pointed out hereinabove, the appellant has remained in jail for nearly 8 years and 10 months. In that view of the matter, we think the interests of justice will be fully met if we impose on him the sentence of rigorous imprisonment he has already undergone from the date of his first arrest on 9th January 1987.

10. In the result, this appeal is partly accepted. The judgment and order of conviction and sentence passed by the learned Sessions Judge of Surendranagar on 8th December 1987 in Sessions Case No. 21 of 1987 is modified by convicting the appellant of the offence punishable under sec. 304 Part 2 of the IPC and by sentencing him to the rigorous imprisonment already undergone from the date of his first arrest on 9th January 1987. The rest of the impugned judgment and order passed by the learned trial Judge is maintained. The appellant is ordered to be set at liberty if no longer required in any other case.

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